

No. 18826 ✓

In the
United States Court of Appeals
For the Ninth Circuit

CHARLES ALBERT GARRETT and)
DOROTHY ELIZABETH DARLING,)
Appellants,)
vs.)
THE UNITED STATES OF AMERICA,)
Appellee.)

APPELLANT'S BRIEF

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CHARLES ALBERT GARRETT and
DOROTHY ELIZABETH DARLING,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

A. STATEMENT OF THE CASE

On or about March 28, 1963, the Grand Jury in the District of Arizona returned a one count indictment against each of the Appellants herein charging the receiving, concealing and facilitation of the transportation and concealment of approximately 37 grams of heroin, a narcotic drug after the importation thereof into the United States in violation of Title 21, United States Code 174. On or about April 8, 1963, each Appellant entered a plea of not guilty to the aforesaid indictment. Thereafter on

June 11, 1963, trial was had to a jury and on that same day, after only 20 minutes deliberation, verdicts were returned finding each appellant guilty as charged. Motions for Judgment of acquittal on behalf of each of the said Appellants were denied at the close of the prosecutions case and at the close of all the evidence. Appellants filed Motions for New Trials on June 13, 1963 and the same were heard and denied on June 24, 1963. Thereafter, on June 24, 1963 the Court entered Judgment on the verdict of the Jury and committed the Appellant, Garrett to the custody of the Attorney General or his authorized representative for imprisonment for a period of 8 years; the Court committed Appellant Darling to the custody of the Attorney General or his authorized agent for imprisonment for a period of 5 years, and recommended that she be hospitalized for Narcotic addiction. Subsequent thereto on June 26, 1963, Appellants filed their respective Notices of Appeal from the verdicts and judgments.

This appeal is prosecuted to vacate and set aside the judgments of guilty and the terms of imprisonment imposed pursuant to the Court's judgments and commitments.

B. EVIDENCE

The following is a summary of the Evidence:

1. Testimony of M. R. Rogers.

M. R. Rogers testified that he was a U.S. Customs Agent and that on November 3, 1963, he was riding with Customs Agent L. O. Viles in a patrol car. That on the aforesaid date he observed a Colored Male along the boundary fence that separates the United States from the Republic of Mexico. He further testified that he did not recognize the individual he referred to in his testimony. He further testified that upon observing the aforesaid, he returned to his headquarters and secured another vehicle and returned to the area. That about 1:00 p.m. he observed a Lincoln convertible pass the area. That he informed Agent Viles as the automobile passed from his view. That later he arrived at an intersection and found Agent Viles, a police officer named Salamon, and the two Appellants at an intersection. That he assisted in a preliminary search which produced nothing and later that Appellant Darling removed a package from under the skirt in the office of the Agency and advised them that Appellant knew nothing whatsoever about the package or its' contents. (R. 16-46)

2. Testimony of Randolph R. Aros.

Randolph R. Aros testified that he was a Customs Agent and that on the 3rd of November, 1963 he was near the International fence after being summoned by Agent Viles. That he observed a man who he identified as the Appellant Garrett near the fence and make a throwing motion and that an object

went over the fence. That later a car drove up and Appellant Darling alighted therefrom. That the automobile containing both Appellants was later stopped and Appellants taken to the Agency office. That Mr. Garrett denied any knowledge of the existence of the package, and Appellant Darling confirmed this statement. That he discovered no contraband as a result of a search of Appellant Garrett's person and the automobile. That Appellant Garrett advised him that he had taken Appellant Darling to the dentist on the Mexican side and produced a receipt as evidence thereof, and that he himself had also visited a dentist office. (R. 46-95)

3. Testimony of David Salamon.

David Salamon testified that he was employed as a police officer by the City of Nogales, Arizona. That he assisted in stopping an automobile containing Appellants at the request of Agent Viles. (R. 96-101)

4. Testimony of Leonard Viles.

Leonard Viles testified that he is a Customs agent and that on November 3, 1963, he saw a colored man walking along the International fence. That he later saw Appellants cross into the United States at the Grand Avenue gate. That he later stopped the automobile containing Appellants and searched and found nothing. That

Appellant Garrett denied any knowledge of any contraband, and Appellant Darling later produced a package and confirmed that Appellant Garrett had no knowledge concerning the same. He also testified that Appellant Garrett produced a dental appointment slip and advised him that Appellant Darling had also visited another Dentist in Mexico. (R. 101-116)

5. Testimony of Jack B. Smith.

Jack B. Smith testified that he was a Customs Inspector and custodian of seized merchandise. That he received Governments Exhibits 1 C and 1 D on the 5th of November 1962 and he initialed the same and mailed them to the Chief United States Chemist. He further testified that he had received the exhibits from Agent Leonard O. Viles and he also identified Government's Exhibit 1 D as the box he used to mail said exhibits and that he did not see Government's Exhibits 1 through 1 D until he observed them in a vault in the Customs Inspection Station the day before the trial. That he turned the same over to Mr. Lindberg. (R. 116-123)

6. Testimony of George S. Hill.

George S. Hill testified that he lived in Whittier, California and that he is a chemist for the United States Customs laboratory. That Government's Exhibit 1 A was

discovered by him in the laboratory in a sealed condition. That he examined the contents thereof and discovered that the same contained heroin and sent the same back to Nogales, Arizona. He later stated on cross examination that the Chief chemist mailed the same back to Arizona, and that he had no knowledge as to whether the package had been opened and resealed. (R. 123-130)

7. Testimony of Jack Sheaffer.

Jack Sheaffer testified that he was a professional photographer and employed by the Arizona Daily Star Newspaper. That he was in the company of counsel for Appellants (Benjamin Lazarow) and Agent Aros at the foot of the hill near where the objects were allegedly thrown. That Agent Aros at that time stated that there was too much brush to observe the landing of the object and that he did not see Appellant Garrett throw the object. He also testified that he took the pictures of the area which were received in evidence as Defendant's exhibits. (R. 135-142)

8. Testimony of Charles A. Garrett.

Charles A. Garrett testified that he agreed to take Appellant Dorothy Darling to Nogales, Sonora, Mexico on November 3, 1963 and secured one L. T. Hill to drive them over from the City of Tucson. That Mr. Hill parked the automobile on the American side

of the border. That Appellant Darling went to the dentist in Mexico and he went in search of another dentist. That upon returning to the area where the car was parked, Mr. Hill was missing and they drove around in an effort to locate him. That they were stopped by the Customs agents and searched. That he advised the Agents that he had no contraband and had merely gone to the dentist and so had Appellant Darling. That he was at one time lost on the Mexican side due to his unfamiliarity with the Mexican side of the border. (R. 142-191)

C. ARGUMENT

The Court erred in failing to grant Appellant Garrett's Motion for Judgment of Acquittal at the close of the Government's case and at the close of all the evidence in view of the fact that said evidence was grossly insufficient on both occasions to sustain a conviction on the count contained in the indictment. (R. 132-134) The entire record fails to actually disclose anything other than the fact that Appellant was in close proximity to contraband of which he had no knowledge. This fact is properly indicated by the testimony of the disinterested witness Jack Shaffer. (R. 135-141), also by virtue of the fact that Agent Aros could not specifically testify that Appellant Garrett made anything more than a throwing motion. (R. 46-52).

The evidence further indicates that Appellant Darling virogoously and continually insisted that Appellant Garrett had nothing to do with, and knew nothing about any contraband found in her possession. (R. 45), (R. 77), and (R. 109-110). According to the testimony of the Customs Agents the package was secured from Appellant Darling from a concealed area under her skirt and was delivered to them outside the presence of Appellant Garrett. (R. 45-46), (R. 57) and R. 116).

In Glover vs. United States, 306 F. 2nd 594, the Court held:

"While the evidence may have been sufficient to cast suspicion upon Glover, that was not enough. Evidence which creates mere suspicion of guilt is not enough. Guilt may not be inferred from mere association."

also citing Thomas vs. United States, 239 F. 2nd 7, Corbin vs. United States, 253 F. 2nd 649, Erwing vs. United States, 296 F. 2nd 320, and Mills vs. United States, 293 F. 2nd 609.

Further, the Court erred in allowing hearsay evidence into the proceeding and also by failing to advise the jury to disregard the same when it was called to his attention. That the aforesaid evidence was grossly improper and highly prejudicial

against both Appellants and precluded a fair and unadulterated consideration of their cases by the jury. (R. 20-21, 23-24, 47-48, 55, 103 and 107). The rule has long been much akin to the one cited in United States vs. Campanaro 63 F. Supp. 811, wherein the Court said:

"Evidence which does not derive its value solely from the credibility of witness, but rests also on veracity of another person is 'hearsay' and is ordinarily inadmissible."

The transcript indicates serious error particularly as the same would concern Appellant Darling wherein the Court allows the testimony of Agent M. R. Rogers to stand as concerns his purported "expert" testimony as to the nature of the alleged contraband as being heroin when in fact no foundation was laid for such testimony. (R. 27). Concerning this the Court held in Lyles vs. United States, 254, F. 2nd 725:

"A fact can be testified to by any witness, but with few exceptions, opinions can be given in evidence only by an expert and reasons for his opinions are part of premise for allowing expert to testify."

It thus becomes apparent that the language in U. S. vs. Markowitz, 176 F. Supp. 681, becomes very material in the case at bar when the Court advised:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the trial Judge's duty to instruct jury to return verdict for accused, and where all substantial evidence is as consistent with innocence as with guilt, it is duty of Appellate Court to reverse a judgment against accused."

D. CONCLUSION

For the reasons hereinabove set forth and argued, I am satisfied that this Honorable Court, upon examination of the record, will be convinced that these Appellants are entitled to have this matter reversed, the indictment quashed and the case dismissed, and accordingly, I pray that the judgments of guilty and the accompanying penalties imposed be set aside and held for naught and that this Honorable Court enter appropriate orders to that end.

Respectfully submitted,

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December, 1963

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT C. RHONE, JR.

